

NO. 47399-2

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

RONALD JAMES SMITH, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Bryan Chushcoff

No. 10-1-00572-4

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court abuse its discretion when it revoked the defendant's SSOSA¹ sentence where any reasonable trial judge might have made the same decision in light of the defendant's history and the seriousness of the violations?

2. Is the pornography condition impermissibly vague where it was imposed as a condition of sexual deviancy treatment, and where the material will be approved and monitored by a treating sexual deviancy counselor?

B. STATEMENT OF THE CASE.

On February 5, 2010, appellant Ronald James Smith (the "defendant") was charged with three counts of first degree child rape and one count of first degree child molestation. CP 1-3. On August 20, 2010, pursuant to a plea bargain, he pleaded guilty to an amended information reducing the charges to three counts of first degree child molestation. CP 10-11. The plea agreement was intended to create eligibility for sentencing under SSOSA. CP 13-28.

The defendant had completed a SSOSA evaluation several months before the guilty plea. CP 33-43. The evaluation was filed at the

¹ Special Sex Offender Sentencing Alternative, RCW 9.94A.670.

sentencing hearing on October 22, 2010. *Id.* In the evaluation, after a series of sexual history polygraph examinations, the defendant admitted sexual contact not only with his current victim but also with several other prepubescent victims stretching back over a period of approximately 40 years. CP 35-36.

The evaluation recommended that the defendant be sentenced to a SSOSA sentence. CP 41-42. It included a recommendation that the defendant not have contact with his current victim except under supervision. CP 42. The evaluation further specified that the defendant “should be prohibited from unsupervised contact with other minor children in and outside the family. He is not anticipating difficulty keeping his distance from children.” *Id.*

On October 22, 2010, the defendant was sentenced under the SSOSA alternative. CP 47-66. His sentence included 130 months in prison with all but nine months suspended on condition of sexual deviancy treatment in lieu of prison. *Id.* An appendix to the judgment and sentence was entered which specified a number of treatment-related conditions. CP 29-31. These included (1) a requirement that the defendant “comply with any recommended treatment by a certified Sexual Deviancy counselor;” (2) that his “Community Corrections Officer will be able to monitor your progress in treatment;” (3) that he “not possess or peruse pornographic materials. Your Community Corrections Officer will consult with the identified Sexual Deviancy Treatment Provider to define pornographic

material;” and (4) “Do not initiate, or have in any way, physical contact with children under the age of 18 for any reason.” CP 29-31.

After the sentencing hearing, the trial court monitored the defendant’s progress for approximately four and a half years. The court received regular reports from his treatment provider and held regular review hearings. CP 71-78, CP 158-220.

On January 14, 2015, the defendant was arrested and booked for violation of his conditions. CP 84-88. The arrest was not related to pornography. The arrest took place during a home visit by the defendant’s community corrections officer (“CCO”), Kimberly Carrillo. CP 106-124. The home visit was prompted by a neighbor’s report that a minor was living in the defendant’s household. *Id.* In a her violation report, Ms. Carrillo reported that the defendant had committed three violations, namely (1) by having resided with a minor between October 2014 and January 14, 2015; (2) by having unauthorized contact with an eleven year old neighbor girl during April to June 2014; and (3) by having failed to maintain payments on his legal financial obligations. CP 110-113. Ms. Carrillo recommended revocation.

A revocation hearing was held on March 20, 2015. RP 3/20/2015. p. 3. The defendant elected to stipulate to the violations. *Id.*, pp. 3-4. The State joined Ms. Carrillo in recommending revocation. *Id.*, p. 6. The defense recommended jail and continued supervision and treatment. *Id.*, pp. 7-12. After hearing from the parties, reviewing the violations in the

amended petition, and reviewing Ms. Carrillo's violation report and attachments, the trial court ordered revocation as follows: "With great reluctance, nonetheless, I'm going to revoke the suspended sentence." RP 3/20/2015, p. 19. The court further ordered that the defendant re-enter treatment upon release and thereafter continue to abide by the previously-imposed supervision conditions. CP 127. The defendant filed a timely notice of appeal on March 26, 2015. CP 128-151.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ORDERED REVOCATION WHERE REASONABLE TRIAL JUDGES COULD HAVE MADE THE SAME DECISION IN LIGHT OF THE SERIOUSNESS OF THE DEFENDANT'S VIOLATIONS AND A CONCERN FOR THE SAFETY OF PREPUBESCENT CHILDREN IN THE COMMUNITY.

In Washington a sentencing alternative for certain sex offenders permits a trial court to suspend the bulk of an offender's term of confinement in lieu of community custody and sexual deviancy treatment. RCW 9.94A.670. Offenders who seek to take advantage of this alternative must complete a sexual deviancy evaluation to determine whether they are amenable to treatment. RCW 9.94A.670(3). If a SSOSA sentence is imposed, the court must impose a number of conditions. RCW 9.94A.670(5) and (6).

SSOSA also provides for procedures and standards for violations of sentencing conditions. RCW 9.94A.670(10)(a). The statute provides for limited discretion on the part of the Department of Corrections. *Id.* Specifically, if the violation is not “a second violation of the prohibitions or affirmative conditions relating to precursor behaviors or activities” the department may elect to impose a sanction or may “refer the violation to the court and recommend revocation of the suspended sentence” *Id.* On the other hand, a second violation carries with it the requirement that the department “refer the violation to the court and recommend revocation of the suspended sentence” RCW 9.94A.670(10)(b).

At a revocation hearing the trial court “may revoke the suspended sentence at any time during the period of community custody and order execution of the sentence if: (a) The offender violates the conditions of the suspended sentence, or (b) the court finds that the offender is failing to make satisfactory progress in treatment.” RCW 9.94A.670(11). The decision whether to revoke is left to the discretion of the trial court and is reviewed for an abuse of discretion. *State v. Ramirez*, 140 Wn. App. 278, 290, 165 P.3d 61, 67 (2007) (“We review revocation of a SSOSA sentence for abuse of trial court discretion. The State need not prove that [the defendant] violated his SSOSA conditions ‘beyond a reasonable doubt but only must ‘reasonably satisfy’ the court the breach of condition occurred’.”) quoting *State v. Badger*, 64 Wn. App. 904, 908, 827 P.2d 318 (1992). *State v. Partee*, 141 Wn. App. 355, 361, 170 P.3d 60, 62 (2007).

In this case, on February 13, 2015, upon the recommendation of the department, the State filed an amended petition for revocation. CP 106-124. Three specific violations of the defendant's suspended sentence conditions were alleged. CP 107. Namely, (1) that the defendant had cohabitated with a seventeen year old girl and her mother for four months, (2) that the defendant had unsupervised contact with a twelve year old child the previous May, and (3) that the defendant had failed to make payments on his legal financial obligations. *Id.* It is unclear whether the parties and the trial court considered the cohabitation with the second child to have been a second violation of the defendant's conditions "relating to precursor behaviors or activities." RCW 9.94A.670(10)(b).

At the March 20, 2015, revocation hearing the defendant elected to stipulate to all three of the alleged violations. RP, March 20, 2015, p. 3-4. The trial court accepted the stipulation and moved immediately to consider whether to revoke or sanction. It is important note that at the time the trial court made its decision, it had four and a half years' experience with the defendant's case [CP 33-43, 69-78, 165-195.], had seen the defendant in court in person seven times [CP 89.], and had reviewed input from the supervising community corrections officer and the defendant's treatment provider [CP 89-105, 106-124.].

The defendant argues that the trial court did not consider input from the treatment provider concerning his chaperone, Karen Wheeler. The defendant may have overlooked the attachments to the amended

revocation petition. Those attachments included copies of the documentation of Ms. Wheeler's approval as the defendant's supervisor. CP 114-19. The trial court had before it (1) the Rules for Offender Contact with Victims or Minors dated February 3, 2014; (2) letter of understanding signed by Ms. Wheeler on February 13, 2014, and provided to the defendant's treatment provider; (3) a February 13, 2014, letter from the treatment provider to the CCO concerning Ms. Wheeler's supervision; and (4) a specific issue polygraph report dated February 3, 2105.

There is no indication that the court ignored these items or was unaware of the amended petition and the attachments. In fact the opposite is supported by the record. The court referred to the attachments (in particular, the polygraph report) during the hearing. RP March 20, 2015, p.13-15. Thus the defendant's arguments that the trial court did not consider those materials is not well taken.

The abuse of discretion standard is particularly appropriate in SSOSA revocations. It applies when "(1) the trial court is generally in a better position than the appellate court to make a given determination . . . (2) a determination is fact intensive and involves numerous factors to be weighed on a case-by-case basis . . . (3) the trial court has more experience making a given type of determination and a greater understanding of the issues involved . . . (4) the determination is one for which "no rule of general applicability could be effectively constructed," . . . and/or (5) "there is a strong interest in finality and avoiding appeals. . . ." *State v.*

Sisouvanh, 175 Wn.2d 607, 621-22, 290 P.3d 942, 949 (2012) (citations omitted).

An abuse of discretion occurs “only if no reasonable person would adopt the view espoused by the trial court.” *State v. Demery*, 144 Wn.2d 753, 758, 30 P.3d 1278, 1281 (2001), citing *State v. Sutherland*, 3 Wn. App. 20, 21, 472 P.2d 584 (1970). “Where reasonable persons could take differing views regarding the propriety of the trial court's actions, the trial court has not abused its discretion.” *Id.* “The trial court's ruling, therefore, will not be disturbed unless this court believes that no reasonable judge would have made the same ruling.” *State v. Thomas*, 150 Wn.2d 821, 854, 83 P.3d 970, 986 (2004), citing *State v. Woods*, 143 Wn.2d 561, 595–96, 23 P.3d 1046 (2001).

Under the deferential abuse of discretion standard, an appellate court “does not substitute its judgment for that of the [trial] court” but rather “will reverse only if we have ‘a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.’” *United States v. Schlette*, 842 F.2d 1574, 1577 (9th Cir.1988), citing *Barona Group of the Capitan Grande Band of Mission Indians v. American Management & Amusement, Inc.*, 824 F.2d 710, 724 (9th Cir.1987) and *United States v. Kramer*, 827 F.2d 1174, 1179 (8th Cir.1987).

The trial court did not abuse its discretion in this case. Review of the trial court’s revocation decision should begin with a survey of the

information available to the trial judge. The original SSOSA evaluation that enabled the defendant to be considered for a SSOSA sentence in the first place, was cautionary. The evaluation noted that the offense for which the defendant was being sentenced was not his first. His sexual deviancy history included three prior prepubescent victims dating back forty years. CP 35. It also included a description of the reluctance of the defendant to truthfully disclose his history even though he knew at the time that his hoped-for SSOSA sentence hung in the balance. CP35-36. The defendant required three sexual history polygraph examinations before the evaluator was comfortable that the defendant had fully disclosed his full sexual deviancy history. *Id.* The SSOSA evaluator's comment is revealing:

[The defendant] has no insight into the obvious fact he is sexually aroused by prepubescent, pubescent and postpubescent females and has reinforced those attractions by actual hands-on sexual contact with a couple of prepubescent children and attempts to molest a twelve-year-old and the teenage girl who is the mother of his most recent victim. . . He does not understand how victims of child abuse are affected and the long-term implications of such behavior.
CP 40.

The assessment of the defendant's sexual deviancy was submitted to the trial court in 2010. The evaluation recommended that the defendant be given a SSOSA sentence despite the evaluator's misgivings but it also included suggested restrictions on his behavior designed to prevent re-offending. The evaluation in no uncertain terms assured the trial judge

that the defendant (1) “understands polygraph examination will be administered to verify compliance with the rules” [CP 42.], and (2) that “Additionally, he should be prohibited from unsupervised contact with other minor children in and outside the family. He is not anticipating difficulty keeping his distance from children.” *Id.*

It could be argued that in light of the foregoing, that the stipulations by themselves would be enough to support any reasonable trial judge’s revocation decision. After all by 2015 the defendant had been under supervision by the Department of Corrections and in treatment for over four years. CP 90-92. It would have been perfectly reasonable for the trial judge to summarily conclude that since “there is no indication that Mr. Smith is being considered for a successful discharge from treatment” [CP 92.], the defendant’s cavalier disregard of the most basic of safety rules, not once but twice, is enough to justify revocation. The judge could have reasonably concluded that rules designed to ensure against the defendant reoffending should not have been so lightly disregarded.

The stipulations were not the sum total of the available evidence and information at the trial judge’s disposal. The petition included copies of the rules the defendant had agreed to for proper, supervised contact with minors a short time before his first relapse. CP 114-15. Those rules were signed by the defendant in February 2014 and explicitly provided that (1) there was to be no “Home Visits,” (2) there were to be no Overnight Visits,” and (3) if there were to be visits outside the home they

would be “per CCO/approved safety plan.” *Id.* Violation number 2 occurred a mere two to four months after the defendant signed the conditions. That violation included unapproved, unsupervised contact with an eleven year old neighbor girl, that was undisclosed to the defendant’s CCO until after the defendant failed a polygraph. CP 112.

The defendant compounded the seriousness of his first violation with a much more serious, ongoing second violation. That violation consisted of the defendant cohabitating with a young female minor over a period of months. No report of this was made to his CCO or treatment provider. No attempt was made to secure permission or a “safety plan” or to explore alternatives. Instead, as was argued by the prosecution: “[A]n individual who withholds this type of contact with minors and lies about that to the CCO and only comes forward whenever they are forced to, prior to the polygraph, isn’t amenable to treatment. They are a danger to the community and any other family members, young family members, that he may eventually come into contact with.” RP March 20, 2015, p. 6.

In an abuse of discretion review it is not necessary to show that all trial judges would have come to the same conclusion. *State v. Thomas*, 150 Wn.2d 821, 854, 83 P.3d 970, 986 (2004), citing *State v. Woods*, 143 Wn.2d 561, 595–96, 23 P.3d 1046 (2001). Instead the standard is met unless “no reasonable judge would have made the same ruling.” *Id.* In this case it is likely that most experienced trial judges would have come to the same conclusion. The judge in this case weighed compassion for the

defendant's age and history when he said, "I have to say this is a bit of a tough one. Mr. Smith, as I understand it, is 77 years old." RP March 20, 2015, p. 14. He further noted that the defendant had been making progress and was offered the opportunity with appropriate safety planning to start having contact with children. *Id.* But the court also considered the violations to be serious and fraught with the potential for harm to befall future victims. RP March 20, 2015, p. 16.

The trial judge articulated his reasoning. "He put me in a bad position here, in terms of making a decision about him, because he didn't – he didn't do what he was supposed to do. He did it anyway and lied about it and we have a hard time tracking him." RP March 20, 2015, p. 16. He applied the experience that any trial judge would have in SSOSA cases by saying, "I don't expect him to sexually abuse a young woman when she walks through the door. I expect him to groom her. I expect him to try to set up situations where who knows what might happen." RP March 20, 2015, p. 17. These observations are supported by the defendant's SSOSA evaluation where the defendant admitted physically molesting and sexually photographing his current victim, and (after three polygraphs) disclosed a history of grooming and abuse of three other female children besides. CP 35.

SSOSA necessarily involves a degree of trust between the defendant and the sentencing court. The defendant is permitted to be in the community rather than prison. In return he abides by the conditions

set by his CCO and his treatment provider. The trial court here did not deem it wise to return the defendant to the community after he had violated that trust. In light of the trial court's experience with this defendant over the course of four years of supervision, and in light of the defendant not having successfully completed his deviancy treatment, the trial judge exercised reasonable judgment when he decided to revoke. Such a reasoned judgment cannot be said to have been an abuse of discretion.

2. A PORNOGRAPHY CONDITION IS NOT IMPERMISSIBLY VAGUE WHEN IT IS IMPOSED PURSUANT TO SEXUAL DEVIANCY TREATMENT, AND WHERE THE MATERIAL WILL BE APPROVED AND MONITORED BY A TREATING SEXUAL DEVIANCY COUNSELOR.

The Sentencing Reform Act authorizes sentencing courts to impose crime-related treatment or counseling, including for sex offenders. RCW 9.94A.505(9). *State v. Riles*, 135 Wn.2d 326, 351, 957 P. 2d 655 (1998) (“A sentencing court has authority under [former] RCW 9.94A.120(9)(c)(iii) to impose treatment or counseling for sex offenders.”) Where such treatment is ordered, the court may also delegate to the community corrections officer or treatment provider further restrictions on the offender's conduct and behavior related to pornography or obscenity. *State v. Sansone*, 127 Wn. App. 630, 643, 111 P.3d 1251 (2005) (“A delegation would not necessarily be improper if [the defendant] were in

treatment and the sentencing court had delegated to the therapist to decide what types of materials [the defendant] could have.”). A similar delegation in the absence of a prior diagnosis of deviancy could be deemed impermissibly vague. *State v. Bahl*, 164 Wn.2d 739, 761, 193 P.3d 678, 689 (2008) (“The condition cannot identify materials that might be sexually stimulating for a deviancy when no deviancy has been diagnosed, and this record does not show that any deviancy has yet been identified.”).

The condition complained of by the defendant in this case is readily distinguishable from *Bahl*. *Bahl* was not a SSOSA case. The trial court sentenced the defendant in *Bahl* to prison and imposed conditions, including a sexual deviancy evaluation and treatment upon release. *Id.* at 743-44. The defendant had not undergone a pre-sentencing evaluation, no treatment plan had been recommended and no treatment provider had been identified. *Id.* at 761. Nor had the defendant in *Bahl* successfully complied with the pornography condition for over four years.

Bahl is a far cry from this case. Here the defendant brought an evaluation and treatment plan to the original sentencing hearing. He requested that the court grant him the benefits of a SSOSA sentence. There is every reason to believe that he knew then, knows now, and will know upon his release from prison what forms of pornography are restricted by his treatment provider who has the authority to “define pornographic material.” CP 30.

Were the court to invalidate the pornography condition in this case, supervision of defendants in sexual deviancy treatment might well be rendered impossible. One may reasonably ask how a sexual deviancy treatment provider could treat an offender if the offender were deemed to have a constitutional right to look at the pornography of his choice regardless of the treatment provider's professional judgment. After all, *Bahl* observed that many courts "have noted that the term 'pornography,' unlike obscenity, has never been given a precise legal definition, at least insofar as adult pornography is concerned." *Id.* at 754.

Such an interpretation of *Bahl* and other similar cases is unwarranted. Delegation of not only the duty to define pornography but also the need for even more intrusive supervision conditions such as polygraph or plethysmograph examinations is permissible where treatment is ordered and there is a treatment provider. *State v. Sansone*, 127 Wn. App. 630, 643, 111 P.3d 1251(2005).

Sansone like *Bahl* was a review of a non-SSOSA sentence condition. It involved an "as-applied" review rather than a review for "facial vagueness." *Id.* at 638. The defendant in *Sansone* was found to have been in possession of images of women with "low-cut blouses," a woman with cloths on only from "the waist down" and a woman covered in "somewhat sheer material." *Id.* at 635. The *Sansone* court held that the pornography condition was impermissibly vague but also stated that a delegation "would not necessarily be improper if [the defendant] were in

treatment and the sentencing court had delegated to the therapist to decide what types of materials [the defendant] could have.” *Id.* at 643.

The limitation of the holding in *Sansone* is not only applicable to this case but also makes perfect sense. In sexual deviancy treatment, it is likely that “obscenity” would in all or nearly all cases be inappropriate for a sex offender in treatment. See *Miller v. California*, 413 U.S. 15, 24, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973). Although pornography, unlike obscenity, might be entitled to some first amendment protection, hard core pornography might nevertheless be deemed inappropriate for a particular sex offender. *State v. Bahl*, 164 Wn.2d 739, 757-58, 193 P.3d 678 (2008). But it might also be inappropriate for a sex offender with a predilection for children to have access to even soft-core pornography or even what some might consider mere titillating material.

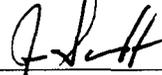
Few sentencing judges would have the expertise to draw an appropriate line at a sentencing hearing. No sentencing court could have the prescient ability to anticipate what materials a particular offender might wish to view. Thus it is wholly appropriate to defer or delegate the line-drawing to the professionals who will necessarily treat and supervise the defendant upon his release from custody. In view of the distinguishing fact in this case, that enforcement of the pornography condition was delegated to a supervising treatment provider, the condition is not impermissibly vague. The condition should be upheld as enforceable once the defendant re-enters treatment at the end of his prison term.

D. CONCLUSION.

For the foregoing reasons the defendant's SSOSA revocation and sentence should be affirmed.

DATED: January 29, 2016.

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